

University of Michigan Journal of Law Reform

Volume 9

1976

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Recommended Citation

Alan V. Reuther, *Protecting Employee Solicitation - Distribution Rights from Union Waiver*, 9 U. MICH. J. L. REFORM 571 (1976).

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PROTECTING EMPLOYEE SOLICITATION-DISTRIBUTION RIGHTS FROM UNION WAIVER

Section 7 of the National Labor Relations Act guarantees various fundamental rights to employees, including the right to self-organization.¹ Recognizing the inherent superiority of the work place as a situs for organizational activities,² the courts and the National Labor Relations Board (hereinafter NLRB or Board)³ have balanced the property interests of employers⁴ against the organizational interests of labor and concluded that employees have the right to distribute literature on the employer's premises in nonworking areas during nonworking time and to solicit support during nonworking time for purposes protected by Section 7,⁵

¹ Section 7, 29 U.S.C. § 157 (1970), provides:

Employees shall have the right to *self-organization*, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added).

The right to self-organization ensures that employees may communicate with each other and with union officials concerning the formation of labor unions, collective bargaining, and other matters encompassed by Section 7. This right protects various forms of organizational activity, including newspaper advertisements, mailings, radio and television appeals, as well as solicitation and literature distribution conducted both on and off the employer's premises. *See Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972); *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963); Comment, *NLRB v. Magnavox Co.: The Death Knell for Union Waivers of Employee Rights to Distribute Literature*, 60 VA. L. REV. 1073 (1974).

² Solicitation and the distribution of literature on the employer's premises are the most efficient means of contacting the entire work force. They are also likely to be the most persuasive form of communication both because of the personal contact involved and because the place of work is the one location where employees share common interests and traditionally seek to persuade each other in matters affecting the employment relation. *See NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963); *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246, 1249 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964).

³ The NLRB administers the National Labor Relations Act. 29 U.S.C. § 141 (1970).

⁴ Employers have the right, based on the common law and the fifth amendment, to use and enjoy their property freely, and specifically to maintain discipline and efficient plant operations. *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *LeTourneau Co. of Georgia*, 54 N.L.R.B. 1253 (1944).

⁵ *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962). *See also NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Walton Mfg. Co.*, 126 N.L.R.B. 697 (1960); *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943).

Since the property rights of employers must yield only where necessary to facilitate the exercise of employees' Section 7 rights, *see Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), employees only have the right to conduct solicitations and literature distributions which are

unless special circumstances of production, discipline, or safety are present.⁶ In *NLRB v. Magnavox Co.*,⁷ the Supreme Court held that unions do not have the power to waive these employee rights. After discussing the historical treatment accorded union waivers of employee solicitation-distribution rights, this note will examine the Court's holding in *Magnavox* and the policies behind its decision. This note will then explore the conclusions reached by subsequent judicial and NLRB decisions concerning the types of solicitation and literature distribution which are immune from union waiver. Finally, this note will suggest that unions must be precluded from waiving any employee solicitation-distribution rights in order to effectuate the central objectives of the nation's labor policy.

I. HISTORICAL TREATMENT OF UNION WAIVERS

Prior to the *Magnavox* litigation, the courts and the NLRB harbored three divergent views on whether unions could bargain away the solicitation-distribution rights of employees.⁸ Drawing support from dicta in

pertinent to matters encompassed by Section 7 while they are on their employer's premises. *E.g.*, *Eastex, Inc.*, 215 N.L.R.B. No. 58 (Dec. 4, 1974). This means that employees can engage in solicitation and literature distribution concerning union organizing campaigns, collective bargaining, representation elections, conditions of employment, and other matters sufficiently related to the interests of employees. But a literature distribution dealing solely with political propaganda, for example, is not protected. *Ford Motor Co.*, 221 N.L.R.B. No. 99 (Nov. 13, 1975).

The phrase "nonworking time" means time in which no work is performed rather than unpaid time. Consequently, employees have the right to engage in self-organizational activities during lunch and break periods even if they are paid for this time. *NLRB v. Armstrong Tire & Rubber Co.*, 262 F.2d 812 (5th Cir. 1959); *NLRB v. Essex Wire Corp.*, 245 F.2d 589 (9th Cir. 1957); *NLRB v. Monarch Tool Co.*, 210 F.2d 183 (6th Cir. 1954); *Olin Indus. v. NLRB*, 191 F.2d 613 (5th Cir. 1951). Employees also have the right to solicit support and distribute literature before or after working hours. But if they are on the employer's premises more than a reasonable period of time before or after their shift, they are considered "off-duty" and normally do not possess these rights. *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539 (8th Cir. 1973); *Diamond Shamrock Co. v. NLRB*, 443 F.2d 52 (3d Cir. 1971); *Tri-County Medical Center, Inc.*, 222 N.L.R.B. No. 174 (Feb. 25, 1976); *G.T.E. Lenkurt, Inc.*, 204 N.L.R.B. 921 (1973).

The phrase "nonworking areas" includes such locations as parking lots, entrance gates, lunchrooms, rest or break areas, restrooms, and the space around time clocks. *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 541 (8th Cir. 1973); *Massey-Ferguson, Inc.*, 211 N.L.R.B. No. 64, slip op. at 3, 4 (June 12, 1974); *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 620 (1962).

⁶ *See, e.g.*, *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539 (8th Cir. 1973); *Davison-Paxon Co., Div. of R.H. Macy v. NLRB*, 462 F.2d 364 (5th Cir. 1972); *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577 (8th Cir. 1968); *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964); *NLRB v. Great Atl. & Pac. Tea Co.*, 277 F.2d 759 (5th Cir. 1960), *modifying* 123 N.L.R.B. 747 (1959); *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956); *NLRB v. May Dep't Stores Co.*, 154 F.2d 533 (8th Cir. 1946), *modifying* 59 N.L.R.B. 976 (1944); *United Parcel Serv., Inc.*, 195 N.L.R.B. No. 77 (1972); *Stuart Cooper*, 136 N.L.R.B. 142 (1967); *United Aircraft Corp.*, 134 N.L.R.B. 1632 (1961).

⁷ 415 U.S. 322 (1974).

⁸ The historical treatment of union waivers of employee organizational rights, and the competing policy arguments in favor of the various positions taken by the

early Board decisions,⁹ the Sixth and Seventh Circuits held that unions had the power to waive solicitation-distribution rights for all employees.¹⁰ These courts emphasized that judicial nullification of contractual waivers violates the basic premise of the nation's labor policy that industrial peace can best be achieved by permitting unions to contract freely with management concerning conditions of employment.¹¹ Moreover, they viewed solicitation and literature distribution on the employer's premises merely as convenient methods of self-organization which could be waived if adequate alternative methods of communication were available.¹² In addition, the Sixth Circuit justified its position by observing that other important Section 7 rights, including the right to strike, are waivable by unions.¹³ This court also noted that since unions usually receive a quid pro quo, such as use of company bulletin boards, for waiving employee organizational rights,

Board and courts are discussed in Dereshinsky, *The Solicitation and Distribution Rules of the NLRB*, 40 U. CIN. L. REV. 417 (1971); Note, *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution*, 56 IOWA L. REV. 152 (1970); Note, *Contractual Waiver by Labor Unions of Employees' Solicitation-Distribution Rights: Time for a Resolution*, 49 NOTRE DAME LAW. 920 (1974); Comment, *Employee Opposition to Incumbent Unions*, 41 U. CHI. L. REV. 190 (1973); Comment, *Employees' Solicitation-Distribution Rights Supersede Contract Waiver*, 26 U. FLA. L. REV. 908 (1974); Comment, *NLRB v. Magnavox Co.: The Death Knell for Union Waivers of Employee Rights to Distribute Literature*, 60 VA. L. REV. 1073 (1974).

⁹ In *May Dep't Stores Co.*, 59 N.L.R.B. 976, 981-82 (1944), modified, 154 F.2d 533 (8th Cir. 1946) the Board noted that contracts negotiated by unions not parties to that proceeding had effectively waived the solicitation rights of employees covered by the contracts. See also *Clinton Foods, Inc.*, 112 N.L.R.B. 239, 263-64 (1955); *Monolith Portland Cement Co.*, 94 N.L.R.B. 1358, 1396 (1951); *Fruitvale Canning Co.*, 90 N.L.R.B. 884, 885 (1950); *W.T. Smith Lumber Co.*, 79 N.L.R.B. 606, 616 (1948); *North American Aviation, Inc.*, 56 N.L.R.B. 959, 962 (1944). These decisions all involved organizational activities in support of the incumbent union.

¹⁰ *General Motors Corp. v. NLRB*, 345 F.2d 516 (6th Cir. 1965), denying enforcement 147 N.L.R.B. 509 (1964); *Armco Steel Corp. v. NLRB*, 344 F.2d 621 (6th Cir. 1965), denying enforcement 148 N.L.R.B. 1179 (1964); *Gale Products, Div. of Outboard Marine Corp. v. NLRB*, 337 F.2d 390 (7th Cir. 1964), denying enforcement 142 N.L.R.B. 1246 (1963).

¹¹ *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 624 (6th Cir. 1965), denying enforcement 148 N.L.R.B. 1179 (1964); *Gale Products, Div. of Outboard Marine Corp. v. NLRB*, 337 F.2d 390, 392 (7th Cir. 1964), denying enforcement 142 N.L.R.B. 1246 (1963). See generally *H.K. Porter v. NLRB*, 397 U.S. 99 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹² *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 625 (6th Cir. 1965), denying enforcement 148 N.L.R.B. 1179 (1964); *Gale Products, Div. of Outboard Marine Corp. v. NLRB*, 337 F.2d 390, 392 (7th Cir. 1964), denying enforcement 142 N.L.R.B. 1246 (1963).

¹³ *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 624 (6th Cir. 1965), denying enforcement 148 N.L.R.B. 1179 (1964). The Supreme Court has established that unions can waive the following rights of employees: to refrain from paying a service fee to the union, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); to strike, *United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); to vote on a proposed contract, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); to refuse to cross picket lines, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); to seniority, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); and to bargain over management functions, *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

nullification of contractual waivers gives unions an undeserved windfall.¹⁴

In contrast, the NLRB, beginning with its decision in *Gale Products, Division of Outboard Marine Corp.*,¹⁵ and the Fifth Circuit held that unions could bargain away the solicitation-distribution rights of their supporters but not of disaffected employees.¹⁶ The Board and the Fifth Circuit arrived at this conclusion by balancing the interference with employees' Section 7 rights against the desirability of preserving contractual freedom.¹⁷ Concerned that unions might waive these rights merely to freeze out opposition rather than to obtain a quid pro quo for employees, they found that the need to protect the freedom of workers to change their bargaining representatives outweighed the policy considerations favoring contractual freedom where the rights of disaffected employees were concerned.¹⁸ The Fifth Circuit pointed out that waivers of the right to strike merely limit a collective economic weapon, whereas waivers of the rights to solicit support and to distribute literature encroach upon self-organizational rights belonging to individual employees.¹⁹ Concluding that these personal rights were too fundamental to be waived, the court noted that even waivers of the right to strike are not enforced where the free selection of the bargaining agent would thereby be endangered.²⁰ The NLRB observed that the presence of alternative methods of communication is relevant only in determining the privileges of non-employee union organizers and not the rights of employees.²¹

Finally, embracing a view previously articulated in a dissenting opinion by Board Member Jenkins,²² the Eighth Circuit held that unions could not

¹⁴ See, e.g., *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 625 (6th Cir. 1965), *denying enforcement* 148 N.L.R.B. 1179 (1964).

¹⁵ 142 N.L.R.B. 1246 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964).

¹⁶ *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir. 1968), *enforcing* 156 N.L.R.B. 872 (1966); *H. & F. Binch Co.*, 168 N.L.R.B. 929 (1967); *General Motors Corp.*, 158 N.L.R.B. 1723 (1966); *Armco Steel Corp.*, 148 N.L.R.B. 1179 (1964), *enforcement denied*, 344 F.2d 621 (6th Cir. 1965); *General Motors Corp.*, 147 N.L.R.B. 509 (1964), *enforcement denied*, 345 F.2d 516 (6th Cir. 1965).

¹⁷ See *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 704-05 (5th Cir. 1968), *enforcing* 156 N.L.R.B. 872 (1966); *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246, 1249 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964).

¹⁸ See *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968), *enforcing* 156 N.L.R.B. 872 (1966); *General Motors Corp.*, 158 N.L.R.B. 1723, 1726-27 (1966); *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246, 1249 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964).

¹⁹ *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705-06 (5th Cir. 1968), *enforcing* 156 N.L.R.B. 872 (1966).

²⁰ *Id.* See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

²¹ *H. & F. Binch Co.*, 168 N.L.R.B. 929, 935 (1967); *Armco Steel Corp.*, 148 N.L.R.B. 1179, 1185 (1964), *enforcement denied*, 344 F.2d 621 (6th Cir. 1965). This principle has been embraced by most circuit courts. See *National Steel Corp. v. NLRB*, 415 F.2d 1231, 1233 (6th Cir. 1969); *Republic Aluminum Co. v. NLRB*, 394 F.2d 405 (5th Cir. 1968); *United Steelworkers of America, AFL-CIO v. NLRB*, 393 F.2d 661 (D.C. Cir. 1968); *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963); *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959). *Contra*, *NLRB v. Rockwell Mfg. Co.*, 271 F.2d 109 (3d Cir. 1959).

²² *General Motors Corp.*, 147 N.L.R.B. 509, 514 (1964) (Jenkins, dissenting opinion), *enforcement denied*, 345 F.2d 516 (6th Cir. 1965).

bargain away the solicitation-distribution rights of any employees.²³ The Eighth Circuit and Jenkins concluded that these rights, whether exercised on behalf of or in opposition to the incumbent union, were simply too fundamental to the letter and spirit of the nation's labor policy to be waived.²⁴ Unlike the two-sided *Gale Products* approach, this position treated all employees alike.²⁵

II. THE *Magnavox* DECISION

When *Magnavox Co.*²⁶ arose in 1972, the NLRB reassessed its views and adopted the position advanced by the Eighth Circuit and Board Member Jenkins. The Board found that the union representing the Magnavox workers had impliedly waived the employees' distribution rights by agreeing to contract terms reserving broad rule-making powers to management and by failing to challenge a rule promulgated by the employer which prohibited the distribution of literature anywhere on company property. The Board endorsed the reasoning of *Gale Products*, observing that the self-organizational rights of individual employees deserve protection against encroachment by either unions or employers. But it no longer perceived any justification for giving more protection to the Section 7 right of employees to reject a bargaining agent than to the Section 7 right of employees to support their union. To guarantee all employees equal literature distribution rights, the Board invalidated the union waiver with respect to all workers.²⁷

Although previous Board orders nullifying union waivers had been phrased in terms of organizational activity related to the selection or rejection of the bargaining agent, in *Magnavox* the Board announced that unions could not bargain away the rights of employees to distribute literature pertaining either to:

- (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) *other matters related to the exercise by employees of their Section 7 rights.*²⁸

The Board added the caveat, however, that since it was concerned solely with protecting the Section 7 rights of employees, its holding extended

²³ *International Ass'n of Machinists v. NLRB*, 415 F.2d 113 (8th Cir. 1969), modifying 171 N.L.R.B. 234 (1968).

²⁴ *Id.* at 115; *General Motors Corp.*, 147 N.L.R.B. 509, 514 (1964) (Jenkins, dissenting opinion), *enforcement denied*, 345 F.2d 516 (6th Cir. 1965). The Eighth Circuit and Board Member Jenkins both failed to explain why they considered employee solicitation-distribution rights to be more fundamental than other Section 7 rights.

²⁵ The Sixth Circuit had criticized the *Gale Products* remedy, arguing that it threatened to undermine industrial peace by creating distinctions between the rights of different workers. *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 624 (6th Cir. 1965), *denying enforcement* 148 N.L.R.B. 1179 (1964).

²⁶ 195 N.L.R.B. 265 (1972), *enforced*, 415 U.S. 322 (1974).

²⁷ *Id.* at 266.

²⁸ *Id.* (emphasis added).

only to the distribution of purely organizational materials and not to the distribution of union institutional literature.²⁹

The Sixth Circuit refused to enforce the NLRB order, reemphasizing its position that unions have the power to waive the self-organizational rights of all employees.³⁰ In a 6-3 decision, the Supreme Court reversed the Sixth Circuit and reinstated the NLRB order.³¹ Recognizing that unions might bargain away the solicitation-distribution rights of employees merely to stifle opposition, the majority and dissent³² agreed that the rights of disaffected employees had to be protected in order to ensure the free selection of collective bargaining representatives. But the majority went further, holding that the solicitation-distribution rights of union supporters also had to be protected from contractual waiver because "employees supporting the union have as secure § 7 rights as those in opposition."³³ The dissent argued that this extension was an unwarranted infringement upon the freedom of unions to contract with management concerning conditions of employment.³⁴

The majority did not elaborate on the rationale behind its decision to protect the solicitation-distribution rights of all employees from union waiver, leaving room for two divergent interpretations. The *Magnavox* decision can be understood as a reaction against the discriminatory treatment of workers permitted in *Gale Products*.³⁵ To ensure the free selection of bargaining agents, representation elections must be conducted under "laboratory conditions," where employees are exposed to all viewpoints and are able to make a reasoned choice free from any interference, restraint, or coercion.³⁶ Allowing only those employees opposed to the incumbent union to engage in organizational activities on the employer's premises clearly places supporters of the union at a disadvantage and permits an imbalance in the presentation of viewpoints, impairing the integrity of the entire election process.

The *Magnavox* decision can also be interpreted as based on the rationale

²⁹ *Id.* The Board did not elaborate on the distinction between institutional and organizational literature, mentioning this caveat only in footnote 9 of its opinion. By institutional literature, the Board probably meant literature prepared or sponsored by unions. See notes 75-76 and accompanying text *infra*.

³⁰ *Magnavox Co. v. NLRB*, 474 F.2d 1269 (6th Cir. 1973), *rev'd*, 415 U.S. 322 (1974). After this adverse ruling, but prior to the Supreme Court's decision, the NLRB twice reaffirmed its position. *Samsonite Corp.*, 206 N.L.R.B. 343 (1973); *Sterling Faucet Co.*, 203 N.L.R.B. 1031 (1973).

³¹ *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

³² The dissenting Justices, Stewart, Powell, and Rehnquist, concurred in part with the majority and rejected the reasoning of the Sixth Circuit. 415 U.S. at 327.

³³ 415 U.S. at 326.

³⁴ The dissent indicated however, that it might be necessary to completely nullify a union waiver where exceptional circumstances made the balanced presentation of viewpoints during a representation controversy impossible under the two-sided *Gale Products* approach. *Id.* at 330-31.

³⁵ See Comment, *NLRB v. Magnavox Co.: The Death Knell for Union Waivers of Employee Rights to Distribute Literature*, 60 VA. L. REV. 1073 (1974).

³⁶ See *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69-70 (1962); *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

that solicitation-distribution rights belong to individual employees rather than to unions, and that these rights are simply too fundamental to be waived.³⁷ The rights of employees to solicit support and to distribute literature at their place of work are inextricably tied to the free exercise of their Section 7 rights to select bargaining representatives and engage in concerted activity for mutual aid or protection. Since Section 7 secures these rights to employees, unions have no authority to encroach upon them.

The ambiguity regarding the Court's rationale for invalidating union waivers with respect to all employees is compounded by uncertainty concerning the scope of *Magnavox*. The Court failed to delineate which types of solicitation and literature distribution³⁸ are immune from union waiver.³⁹ The majority did not reiterate the NLRB's statement that unions cannot waive the rights of employees to distribute literature pertaining to the selection or rejection of the bargaining agent or to other matters related to the exercise by employees of their Section 7 rights.⁴⁰ Nor did the majority explicitly approve the Board's distinction between organizational and institutional literature.⁴¹ Since the Court enforced the Board's order, the majority's silence on these matters could be construed as an implied endorsement of the Board's positions. Indeed, the dissent presumed that the majority had agreed with the Board's institutional literature exception. The dissent observed, however, that the Court's decision dealt only with the rights of employees to distribute literature relating to the selection, rejection, or displacement of the bargaining agent.⁴²

The scope attributed to the *Magnavox* decision should depend partly on the rationale behind the majority opinion. If the *Magnavox* decision is a reaction against discriminatory policies which impair the integrity of the election process, unions would still be permitted to bargain away the solicitation-distribution rights of all employees so long as organizational activities related to the selection or rejection of the bargaining agent, or conducted during the period immediately preceding representation elections, are exempted.⁴³ Moreover, no distinction could be made between the distribution of organizational and institutional literature, since the latter may be the only effective means of presenting the incumbent union's point of view during a representation controversy.

³⁷ See Comment, *Employees' Solicitation-Distribution Rights Supersede Contract Waiver*, 26 U. FLA. L. REV. 908 (1974). Employee solicitation-distribution rights are fundamental because other Section 7 rights can only be fully realized if employees are able to communicate freely with each other.

³⁸ The majority seemed to use the terms "solicitation" and "distribution" interchangeably, implying that unions cannot encroach on either of these employee rights. 415 U.S. at 324-25. In contrast, the dissent was careful only to refer to the distribution of literature. 415 U.S. at 327-30.

³⁹ See the discussion in note 5 *supra*, concerning the types of solicitation and literature distribution which employees have the right to conduct in the workplace.

⁴⁰ See note 28 and accompanying text *supra*.

⁴¹ See note 29 and accompanying text *supra*.

⁴² 415 U.S. at 329.

⁴³ See *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 415 F.2d 113, 115 (8th Cir. 1969), *modifying* 171 N.L.R.B. 234 (1968), where the Eighth

In contrast, if the *Magnavox* decision is a defense of fundamental, personal rights, then any waiver of employee solicitation-distribution rights is improper, regardless of its breadth. While a union may be allowed to waive its own rights as an organization to distribute institutional literature,⁴⁴ it would not be able to interfere with the right of individual employees to distribute materials, including those sponsored by the union.

The Supreme Court may have been deliberately vague about the scope and rationale of its decision. Cognizant of the delicate interaction between employee, union, and employer rights in this area, the Court may have preferred to give the NLRB, with its superior expertise in labor relations, the maximum freedom to implement this new policy on a case by case basis. Moreover, the Court may have wanted to avoid rendering a definitive statement until the Board and the lower courts had been given an opportunity to wrestle with the problems posed by the application of *Magnavox* to concrete factual situations.⁴⁵ Post-*Magnavox* decisions should be examined with this in mind.

III. POST-*Magnavox* DECISIONS

A. Union Waivers and Section 7

NLRB decisions since *Magnavox* have not explored the rationale behind the Supreme Court's conclusion that the solicitation-distribution rights of all employees are immune from union waiver. Nevertheless, these decisions have interpreted *Magnavox* to give broad protection to the self-organizational rights of employees.⁴⁶ The Board has construed the Supreme

Circuit left open the question whether a partial waiver would be permissible. *See also* United Aircraft Corp. v. NLRB, 440 F.2d 85 (2d Cir. 1971); Mason & Hanger-Silas Mason Co. v. NLRB, 405 F.2d 1 (5th Cir. 1968).

⁴⁴ If the NLRB's institutional literature exception is narrowly interpreted to encompass only distributions of institutional materials by official representatives of unions, then it would be consistent with the "individual rights" interpretation of the *Magnavox* decision.

⁴⁵ The fact that three Justices dissented from the majority's broad language suggests that future changes in the composition of the Court might bring about a retrenchment in its position. The retirement of Justice Douglas, who wrote the majority opinion, and the appointment of Justice Stevens to take his place has probably strengthened the position of the dissenters since Stevens was a member of the Seventh Circuit which had permitted unions to waive the organizational rights of all employees. Since all of the Justices agreed that unions cannot waive the solicitation-distribution rights of their opponents, this question would seem to be permanently resolved. While a return to the *Gale Products* approach is conceivable, a new Court majority could also interpret *Magnavox* as being concerned only with the impact of the discriminatory *Gale Products* remedy on the integrity of the election process, and thus limit the decision, as the dissenters suggested, to the distribution of literature pertaining to the selection, rejection or displacement of a bargaining agent. *See* note 42 *supra*.

⁴⁶ While most of the Board decisions have dealt with literature distribution, several have also invoked the authority of *Magnavox* to protect the solicitation rights of employees. *Graham Ford, Inc.*, 218 N.L.R.B. No. 148 (June 30, 1975); *Eastex, Inc.*, 215 N.L.R.B. No. 58 (Dec. 4, 1974).

Court's decision as an implied endorsement of its order in *Magnavox*.⁴⁷ Consequently, the Board has concluded that unions are precluded from bargaining away the rights of employees to distribute any organizational literature which pertains to matters encompassed by Section 7, and not simply literature which concerns the selection or rejection of the bargaining representative.⁴⁸ For example, in *Yellow Cab, Inc.*⁴⁹ the Board declared that under the Supreme Court's decision unions cannot bargain away the "general right of employees under Section 7 of the Act to distribute literature in support of collective bargaining or other mutual aid or protection. . . ."⁵⁰ Likewise, in *Massey-Ferguson, Inc.*⁵¹ the Board interpreted *Magnavox* to hold that unions cannot waive the right of employees to distribute literature "concerning their Section 7 interests."⁵²

Applying this expansive interpretation of the Supreme Court's decision, the NLRB has protected the distribution of diverse types of literature from union waiver. The Board has found that literature distributions directly concerned with working conditions are pertinent to the Section 7 rights of employees and consequently are immune from union waiver. In *Ford Motor Co.*⁵³ it stated that a union could not bargain away an employee's right to distribute leaflets discussing, among other things, the issue of forced overtime in the employer's plant.⁵⁴ Similarly, the Board held

⁴⁷ See *Ford Motor Co.*, 221 N.L.R.B. No. 99, slip op. at 6 (Nov. 13, 1975); *General Motors Corp.*, 212 N.L.R.B. No. 45, slip op. at 5 (June 28, 1974), *modified*, 512 F.2d 447 (6th Cir. 1975). See also *Ford Motor Co. (Sterling Plant)*, N.L.R.B. Ad. L. Decision No. JD-427-74, slip op. at 11 (June 21, 1974). The Board has generally patterned its orders in post-*Magnavox* decisions after the *Magnavox* order. See note 28 *supra*.

⁴⁸ See *Ford Motor Co.*, 221 N.L.R.B. No. 99, slip op. at 6, 7 (Nov. 13, 1975); *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. No. 46, slip op. at 5 (Nov. 4, 1975); *Massey-Ferguson, Inc.*, 211 N.L.R.B. No. 64 (June 12, 1974); *Yellow Cab, Inc.*, 210 N.L.R.B. 568 (1974); *McDonnell Douglas Corp.*, 210 N.L.R.B. 280 (1974). See also *Ford Motor Co. (Sterling Plant)*, N.L.R.B. Ad. L. Decision No. JD-427-74, slip op. at 10-12 (June 21, 1974).

In *Ford Motor Co.*, 221 N.L.R.B. No. 99 (Nov. 13, 1975), the Board found that a rule prohibiting unauthorized distribution of literature was invalid even though it specifically exempted the distribution of literature pertaining to the selection or rejection of a union as the bargaining agent. In *McDonnell Douglas Corp.*, 210 N.L.R.B. No. 29 (Apr. 29, 1974), the Board dismissed as irrelevant the fact that no representation election could be held in the factory for twelve months.

⁴⁹ 210 N.L.R.B. 568 (1974).

⁵⁰ *Id.* at 569.

⁵¹ 211 N.L.R.B. No. 64 (June 12, 1974).

⁵² *Id.*, slip op. at 2, 3. See also *Ford Motor Co. (Sterling Plant)*, N.L.R.B. Ad. L. Decision No. JD-427-74, slip op. at 9 (June 21, 1974), where it was observed that *Magnavox* protects the rights of employees to distribute literature "for purposes protected by Section 7 of the Act."

⁵³ 221 N.L.R.B. No. 99 (Nov. 13, 1975). Although the Board found that the union had not in fact waived the distribution rights of employees, it went on to consider whether the purported waiver would be valid under *Magnavox* in any event. *Id.*, slip op. at 5, 6.

⁵⁴ The leaflets discussed general economic and political subjects as well as the issue of forced overtime. The Board reaffirmed its position that the presence of social comment in literature does not detract from the conclusion that its distribution is protected by Section 7 and hence immune from union waivers so long as some

in *Dreis & Krump Manufacturing, Inc.*⁵⁵ that a union could not waive an employee's right to distribute leaflets criticizing the poor quality of supervision by the employer's foremen as it related to training, safety, and discipline.

The Board has also found that literature distributions dealing with internal union affairs are pertinent to matters encompassed by Section 7 and, therefore, protected under the *Magnavox* decision. In *McDonnell Douglas Corp.*⁵⁶ the Board determined that because employees were compelled to pay dues under a union shop agreement, the distribution of leaflets opposing an increase in dues was directly related to conditions of employment and, consequently, immune from union waiver. Further, in *Ford Motor Co. (Sterling Plant)*⁵⁷ an administrative law judge⁵⁸ stated that a union could not waive an employee's right to distribute leaflets urging his fellow workers to attend the next union meeting in order to demand an additional committeeman allegedly due them, because the distribution was an attempt to spur the union to more effective representation and therefore was pertinent to the Section 7 rights of employees.⁵⁹

The Board has even invoked the authority of *Magnavox* to protect organizational activities on the fringes of Section 7, holding that unions have no power to bargain away the rights of employees to distribute literature which only indirectly concerns conditions of employment.⁶⁰ In

portion of the material pertains to the employment relation. *Id.*, slip op. at 4, 7. See also *Eastex, Inc.*, 215 N.L.R.B. No. 58, slip op. at 10 (Dec. 4, 1974); *Samsonite Corp.*, 206 N.L.R.B. 343, 346 (1973).

⁵⁵ 221 N.L.R.B. No. 46 (Nov. 4, 1975). The Board questioned whether this right had actually been waived by the union.

⁵⁶ 210 N.L.R.B. 280 (1974).

⁵⁷ N.L.R.B. Ad. L. Decision No. JD-427-74, slip op. at 11, 12 (June 21, 1974).

⁵⁸ Administrative law judges are part of the NLRB's staff. They conduct the initial hearings on unfair labor practice charges and must issue a report and recommended order based on their findings. This recommended order can then be appealed to the NLRB. See 29 U.S.C. § 160(c) (1970); 29 C.F.R. § 101.10-.12 (1975).

⁵⁹ The administrative law judge first determined that the union had not in fact waived the distribution rights of employees, but then also considered whether the purported waiver would be valid under *Magnavox* in any event. *Ford Motor Co. (Sterling Plant)*, N.L.R.B. Ad. L. Decision No. JD-427-74, slip op. at 12 (June 21, 1974). No exceptions were filed to the judge's report, and consequently his findings and conclusions were adopted by the NLRB on July 26, 1974, pursuant to Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1970).

While the precedential value of administrative law judge decisions is minimal, this opinion does reveal the analysis of union waivers now being made by the administrative agency in charge of implementing the nation's labor policy.

⁶⁰ The expansive interpretation of Section 7 advanced by the Board in waiver cases comports with its approach in other areas where it has also held that concerted activities related only indirectly to conditions of employment are nevertheless protected by Section 7. See, e.g., *Russell Sportswear Corp.*, 197 N.L.R.B. 1116 (1972); *G & W Elec. Specialty Co.*, 154 N.L.R.B. 1136 (1965), *enforcement denied in part*, 360 F.2d 873 (7th Cir. 1966). However, the Seventh Circuit has rejected this viewpoint, holding that concerted activities must be at least directly concerned with the employment relation to be encompassed within Section 7. *Id.* One author has suggested that in deciding whether certain concerted activity is protected by Section 7, the courts and the NLRB should balance the coerciveness of the activity against the immediacy of its objectives to the employment relation. See Haggard,

*Massey-Ferguson, Inc.*⁶¹ the Board concluded that a newsletter distributed by a dissident caucus was pertinent to matters encompassed by the Section 7 rights of the Massey-Ferguson employees, even though it made no reference to the company, its employees, or the local union representing them. Noting that the same international union represented workers at Massey-Ferguson and Chrysler, and that contract negotiations with Massey-Ferguson were underway at the time, the Board decided that because a portion of the newsletter warned that the terms of a contract recently negotiated with Chrysler would set a disadvantageous pattern for other negotiations, its distribution was sufficiently related to conditions of employment at Massey-Ferguson to warrant nullification of the union's waiver.⁶²

Likewise, in *Yellow Cab, Inc.*⁶³ the Board held that the distribution of leaflets urging employees to attend a demonstration in support of workers striking against another employer was immune from union waiver. Because the leaflet distribution attempted to promote labor solidarity against an alleged union-busting combination, the Board found that it concerned the Section 7 right of Yellow Cab employees to engage in concerted activities for mutual aid and protection, even though the demonstration was not being sponsored by their union.⁶⁴

It is unclear whether the courts will interpret *Magnavox* as expansively as the NLRB. The only judicial decision dealing with union waiver of

Picket Line Observance as a Protected Concerted Activity, 53 N.C.L. REV. 43, 102-06 (1974).

Despite this uncertainty about the proper standard to be applied in deciding whether concerted activities come within the scope of Section 7, the Board's determinations that the distributions in *Massey-Ferguson, Inc.* and *Yellow Cab, Inc.* (see notes 61-64 and accompanying text *infra*) were pertinent to Section 7 can be justified on more general authority. It is well established that concerted activities need not be sponsored by a union to be protected by Section 7. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); NLRB v. Guernsey-Muskingum Co-op, Inc., 285 F.2d 8 (6th Cir. 1960); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983 (7th Cir. 1948); Ohio Oil Co., 92 N.L.R.B. 1597 (1951). Moreover, numerous Board and court decisions have indicated that, because the generation of labor solidarity benefits employees, concerted activities in support of another employer's workers can also be encompassed within Section 7. Texaco, Inc. v. NLRB, 462 F.2d 812 (3d Cir. 1972), enforcing 189 N.L.R.B. 343 (1971); NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965); NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942); Russell Sportswear Corp., 197 N.L.R.B. 1116 (1972); Washington State Serv. Employees' State Council No. 18, 188 N.L.R.B. 957 (1971); General Elec. Co., 169 N.L.R.B. 1101 (1968), enforced, 411 F.2d 750 (9th Cir. 1969).

⁶¹ 211 N.L.R.B. No. 64 (June 12, 1974).

⁶² As further justification for its decision, the NLRB pointed to another article in the newsletter which analyzed the role played by local union leadership in the relationship between individual members and the international union. In upholding the right of employees to distribute this particular newsletter, the Board rejected as irrelevant the presence of reasonable alternative means of communication. *Id.*, slip op. at 2, 3.

⁶³ 210 N.L.R.B. 568 (1974).

⁶⁴ The NLRB had previously indicated in *Samsonite Corp.*, 206 N.L.R.B. 343, 346-48 (1973), that organizational activity could be protected by Section 7 and hence immune from union waiver even if it was not union activity.

employee solicitation-distribution rights since the Supreme Court's decision is *General Motors Corp. v. NLRB*.⁶⁵ In this case, the Sixth Circuit held that *Magnavox* precludes unions from bargaining away the right of employees to distribute literature concerning candidates for union office because

the election of officers has a significant bearing on the character of a union and hence contributes to the selection or rejection of the union as the employees' bargaining representative.⁶⁶

The above language may simply reflect the fact that the Sixth Circuit was not obliged to adopt a broader interpretation of *Magnavox* in order to protect this particular literature distribution. However, the court's past endorsement of union waivers⁶⁷ suggests that it may prefer to interpret *Magnavox* more narrowly and invalidate union waivers only when they impinge at least indirectly on the employees' choice of a bargaining representative.⁶⁸

Since many factors "contribute" to the selection or rejection of a union as the bargaining agent, the approach adopted by the Sixth Circuit could be used to protect other types of organizational activity. But the NLRB's interpretation of *Magnavox* represents a more expansive and straightforward method of giving protection to the solicitation-distribution rights of employees. Indeed, by construing the Supreme Court's decision to protect any organizational solicitation or literature distribution which is pertinent to matters encompassed by Section 7, the Board has made the question of union waivers largely irrelevant. Employees have the right to solicit support and distribute literature on their employer's premises only for purposes protected by Section 7.⁶⁹ Consequently, under the Board's expansive interpretation of *Magnavox*, the question of whether unions can waive the right of employees to conduct a particular solicitation or literature distribution coincides with the question whether employees possess this right in the first place. Both questions turn on the same standard: whether the activity is pertinent to the Section 7 rights of employees. The Board made this apparent in *McDonnell Douglas Corp.*⁷⁰ where it observed that the first

⁶⁵ 512 F.2d 447 (6th Cir. 1975), *modifying* 211 N.L.R.B. No. 123 (June 25, 1974).

⁶⁶ *Id.* at 448. The Board advanced a similar rationale, but also noted that the right to oppose the reelection of incumbent union officials is encompassed by Section 7. 211 N.L.R.B. No. 123, slip op. at 8, 9 (June 25, 1974), *modified*, 512 F.2d 447 (6th Cir. 1975).

⁶⁷ See note 10 *supra*.

⁶⁸ The court refused to enforce that portion of the NLRB order which referred to other matters pertaining to the employees' Section 7 rights. (Beginning with *Magnavox*, Board orders nullifying union waivers have generally contained this language. See notes 28, 47-48 and accompanying text *supra*.) However, the Sixth Circuit observed that this portion of the order did not "correspond to violations actually found," and thus did not expressly reject the Board's expansive interpretation of the *Magnavox* decision. 512 F.2d 447, 448 (6th Cir. 1975), *modifying* 211 N.L.R.B. No. 123 (June 25, 1974).

⁶⁹ See note 5 and accompanying text *supra*.

⁷⁰ 210 N.L.R.B. 280 (1974). The Board embraced the same approach in several other decisions. See *Ford Motor Co.*, 221 N.L.R.B. No. 99, slip op. at 7 (Nov. 13,

question to be answered was whether the distribution was pertinent to matters encompassed by Section 7. Finding the requisite nexus between the literature distribution and Section 7, it concluded that both the union and the employer were precluded from interfering with the activity.

The Board has left unions with little power over employee solicitation-distribution rights. If a particular solicitation or literature distribution is pertinent to matters encompassed within Section 7, then neither the union nor the employer can encroach upon the right of employees to conduct it in the workplace. But if the solicitation or literature distribution is not pertinent to Section 7, then the employer can unilaterally prohibit it,⁷¹ leaving the union with literally no employee right to waive. While the employer may wish to give its prohibition of the unprotected activity added force by incorporating it into a collective bargaining agreement, the union would be endorsing the employer's rule rather than bargaining away an employee right over which it had some control.

The Board's expansive interpretation of the *Magnavox* decision is consistent with the view that solicitation and literature distribution are fundamental, personal rights belonging to individual employees rather than to unions.⁷² At the very least, it indicates that these rights are crucial to the effectuation of all Section 7 rights, and not simply the employees' choice of a bargaining representative.

B. Institutional Literature

Although the NLRB has relied on the *Magnavox* decision to give broad protection to the distribution of organizational literature, it has maintained that unions may still bargain away the rights of employees to distribute union institutional literature. This exception was first suggested by a footnote in the Board's *Magnavox* opinion.⁷³ Subsequent decisions have reiterated this distinction without elaborating on its meaning.⁷⁴ The only

1975); Massey-Ferguson, Inc. 211 N.L.R.B. No. 64, slip op. at 2 (June 12, 1974). The Board's decision in *Ford Motor Co.* is particularly instructive. Although it found that a literature distribution dealing with the issue of forced overtime was pertinent to Section 7 and hence immune from contractual waiver, at the same time the Board held that the distribution of a newsletter discussing the political endorsements of labor unions and calling for the formation of a true workers' party was not encompassed by Section 7 and therefore was capable of being prohibited unilaterally by the employer. 221 N.L.R.B. No. 99, slip op. at 8 (Nov. 13, 1975).

⁷¹ See note 5 *supra*.

⁷² See note 37 and accompanying text *supra*.

⁷³ See note 29 and accompanying text *supra*. The dissent in the Supreme Court later endorsed this notion without adding any further explanation. See note 42 and accompanying text *supra*.

⁷⁴ See General Motors Corp., 212 N.L.R.B. No. 45, slip op. at 5 (June 28, 1974), modified, 512 F.2d 447 (6th Cir. 1975); Massey-Ferguson, Inc., 211 N.L.R.B. No. 64, slip op. at 3 (June 12, 1974); McDonnell Douglas Corp., 210 N.L.R.B. 280, 281 (1974); Samsonite Corp., 206 N.L.R.B. 343, 347 (1973).

One reason for the absence of any detailed analysis of the institutional-organizational distinction is that the Board has not yet been confronted with a case involving the distribution of literature determined to be "institutional." Hence, the distinction is so far established only by dicta.

attempt to define institutional literature occurred in *Ford Motor Co. (Sterling Plant)*,⁷⁵ where the administrative law judge concluded that it meant "material prepared or sponsored by the incumbent labor organization."⁷⁶

While Board decisions have failed to delineate clearly the distinction between institutional and organizational literature, they have indicated what types of literature will not be considered institutional. So long as the literature is critical of the incumbent union or its policies, it will not be characterized as institutional even though it deals with purely internal union matters,⁷⁷ is issued regularly,⁷⁸ or is distributed by a minor local union official.⁷⁹ These decisions indicate that the institutional literature exception is only a narrow caveat to the Board's general policy against union waivers.

No matter how narrowly this exception is defined, however, the wisdom of distinguishing between institutional and organizational literature is open to doubt. It is exceedingly difficult to draw a clear line between the two types of materials. The amount of technical and financial assistance rendered by the union in the preparation of the literature, the identity or positions of the people involved in its distribution, and even the subject matter and perspective contained in the material all have to be considered in determining the institutional character of literature.⁸⁰ While arbitrary rules could be formulated to make enforcement of the institutional-organizational distinction manageable, such rules would lead to inequitable results and would probably encourage unions to alter their distribution techniques in order to circumvent the restrictions.

Moreover, permitting unions to bargain away the rights of employees to distribute institutional literature conflicts with both of the rationales for the *Magnavox* decision. If *Magnavox* is interpreted as resting on the

⁷⁵ N.L.R.B. Ad. L. Decision No. JD-427-74 (June 21, 1974).

⁷⁶ *Id.*, slip op. at 11.

⁷⁷ General Motors Corp., 211 N.L.R.B. No. 123 (June 25, 1974), *modified*, 512 F.2d 447 (6th Cir. 1975); McDonnell Douglas Corp., 210 N.L.R.B. 280 (1974); Ford Motor Co. (Sterling Plant), N.L.R.B. Ad. L. Decision No. JD-427-74 (June 21, 1974).

⁷⁸ Samsonite Corp., 206 N.L.R.B. 343 (1973).

⁷⁹ Ford Motor Co. (Sterling Plant), N.L.R.B. Ad. L. Decision No. JD-427-74 (June 21, 1974).

⁸⁰ Difficulties are bound to arise when these factors point to disparate conclusions. For example, an interesting question would have been presented in *Massey-Ferguson, Inc.* if the incumbent administration of the local union had sponsored the distribution of leaflets attacking the international union's settlement with Chrysler. Whether local union funds and equipment were used to prepare the leaflets, and whether the officers distributed the leaflets in the course of their official duties would be important considerations in deciding if the material was in fact institutional. *Cf.* Retail Clerks Union, Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969), where the court held that several local unions did not violate the provisions of the Landrum-Griffin Act which prohibit unions from spending money collected from dues to support the candidacy of any person for union office when they contributed money from their treasuries to a committee formed for the purpose of attempting to get their international union's recent election declared invalid.

premise that the distribution of literature is a fundamental right belonging to individual employees, then unions should have no authority to encroach upon this right irrespective of the nature of the material being distributed. The individual employee should be free to distribute any literature which he or she desires.⁸¹ Since workers supporting an incumbent union will look toward it for official position statements, any waiver of the right to distribute material sponsored by the union will also cripple the ability of workers to engage in organizational activities.

If, on the other hand, *Magnavox* is perceived as an effort by the Court to ensure the free flow of ideas and opinions that is crucial to the maintenance of a "laboratory conditions" environment for representation elections, then unions should not be able to impinge upon the integrity of the election process by agreeing to the exclusion of institutional literature. Especially where opponents of the incumbent union are aided by an organized caucus or rival union, supporters of the incumbent union must have access to its institutional resources in order to ensure a balanced presentation of viewpoints. It makes no difference that the incumbent union may in a sense be responsible for placing itself in a disadvantageous position; the public interest in promoting the free selection of collective bargaining representatives transcends the interests of the parties immediately involved.⁸²

IV. UNION WAIVERS AND FREE SPEECH

The NLRB and the courts should eliminate all union waivers of employee solicitation-distribution rights because they are inconsistent with the central objectives of American labor policy. The basic purpose of the National Labor Relations Act is to promote industrial peace by granting workers a measure of control over their representatives and working conditions.⁸³ Convinced that the ideal of industrial self-determination can only be achieved through a democratic labor movement,⁸⁴ Congress subsequently enacted the Labor-Management Reporting and Disclosure Act (LMRDA).⁸⁵ Dealing primarily with the union-member relationship,⁸⁶

⁸¹ However, from this perspective a union should still be able to bargain away its own right as an organization to distribute institutional literature. See note 44 and accompanying text *supra*.

⁸² In *Sterling Faucet Co.*, 203 N.L.R.B. 1031 (1973) the Board held that an incumbent union was not estopped from raising the existence of an overly broad no-distribution rule in its collective bargaining agreement as an objection to a representation election which it lost. Because the rule had impinged upon the employee's freedom of choice in the election, the NLRB ordered a new election even though this gave the culpable party, the incumbent union, a "second bite at the apple."

⁸³ See 29 U.S.C. § 151 (1970); Comment, *Employee Opposition to Incumbent Unions*, 41 U. CHI. L. REV. 190, 198 (1973).

⁸⁴ See *Navarro v. Gannon*, 385 F.2d 512, 518-19 (2d Cir. 1967); *Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 580 (1973); *Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 830 (1960).

⁸⁵ 29 U.S.C. § 401 *et seq.* (1970).

⁸⁶ See *Cox, supra* note 84, at 852.

this statute contains a "Bill of Rights"⁸⁷ for union members which is intended to encourage and protect union democracy by assuring union members rights similar to those secured to citizens by virtue of the Constitution.⁸⁸ In particular, section 101(a)(2) of the "Bill of Rights" guarantees union members the right of free speech.⁸⁹ This section reflects the belief that union democracy, like political democracy, can only flourish where there is full freedom to dissent and to criticize.⁹⁰

Although section 101(a)(2) is basically designed to prevent unions from infringing upon the freedom of employees to discuss the management of their union at union meetings, it also declares that union members have the right "to express any views, arguments, or opinions"⁹¹ The courts have interpreted this language to mean that the protection afforded by section 101(a)(2) extends to speech dealing with subjects other than intra-union matters⁹² and to speech uttered outside the confines of meetings in local union halls.⁹³ Moreover, it is clear that section 101(a)(2) encompasses the dissemination of written materials as well as pure speech.⁹⁴

⁸⁷ Subchapter II of the LMRDA is entitled, "Bill of Rights of Members of Labor Organizations." This portion of the Act secures five basic rights, including the right of free speech, to all union members. 29 U.S.C. § 411(a)(1)-(5) (1970).

⁸⁸ See *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967); *Schuchardt v. Millwrights & Mach. Erectors Local Union No. 2834*, 380 F.2d 795, 797 (10th Cir. 1967); *Amalgamated Clothing Workers of America, Rank & File Comm. v. Amalgamated Clothing Workers of America, Philadelphia Joint Bd.*, 334 F. Supp. 760, 762 (E.D. Pa. 1971), *aff'd*, 473 F.2d 1303 (3d Cir. 1973).

⁸⁹ 29 U.S.C. § 411(a)(2) (1970). This section provides:

FREEDOM OF SPEECH AND ASSEMBLY—

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting. . . .

⁹⁰ See *Navarro v. Gannon*, 385 F.2d 512, 519 (2d Cir. 1967). Unions have been characterized as quasi-governmental bodies; see *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198 (1944); Note, *May a Union Bargain Away an Employee's Right of Free Speech?*, 44 NEB. L. REV. 645, 651-55 (1965); and union democracy compared to political democracy; see *Beaird*, *supra* note 84, at 580; *Cox*, *supra* note 84, at 830. Extending this analogy, the solicitation-distribution rights of employees may be compared with the first amendment rights which citizens enjoy in that both are crucial to the realization of a vital democracy.

⁹¹ 29 U.S.C. § 411(a)(2) (1970).

⁹² See *Farnum v. Kurtz*, 2 Cal. App. 3d Supp. 1, 81 Cal. Rptr. 924 (1969). See also *Kuebler v. Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359 (6th Cir. 1973); *Rosen v. Painters Dist. Council 9*, 50 CCH LAB. CAS. 19,245 (S.D.N.Y. 1964); *Mitchell v. Machinists*, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961).

⁹³ See *Fulton Lodge No. 2 of the Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Nix*, 415 F.2d 212 (5th Cir. 1969); *Yanity v. Benware*, 376 F.2d 197 (2d Cir. 1967); *Deacon v. International Union of Operating Engineers, Local No. 12*, 273 F. Supp. 169 (C.D. Cal. 1967); *Graham v. Soloner*, 220 F. Supp. 711 (E.D. Pa. 1963); 105 CONG. REC. 6718 (1959) (remarks of Sen. McClellan); *Cox*, *supra* note 84, at 834.

⁹⁴ See *International Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers v. Rafferty*, 348 F.2d 307 (9th Cir. 1965); *Farowitz v. Associated Musicians of Greater New York, Local 802*, 330 F.2d 999 (2d Cir. 1964); *Salzhandler v.*

Given this expansive construction of the LMRDA's free speech provisions, it is apparent that the unions cannot directly infringe upon the freedom of workers to solicit support and distribute literature in the workplace. Since it is incongruous to permit unions to accomplish through agreement with management what they are prohibited from doing alone, union waivers of employee solicitation-distribution rights could also be deemed to violate section 101(a)(2).⁹⁵ At the very least, union waivers of these self-organizational rights contradict the values and objectives embodied in this section. To truly effectuate the declared congressional policy of industrial self-determination through a democratic labor movement, workers must have the freedom to express their opinions, whether favorable or adverse to the incumbent union, through solicitation and literature distribution conducted on the employer's premises, as well as through union hall debates.

Protecting freedom of expression by employees, in the workplace or in union halls, has certain costs. Besides weakening the authority wielded by unions as the exclusive representative of workers in a particular bargaining unit,⁹⁶ it also encourages the proliferation of dissident activities which may foster instability and demagoguery in the labor movement.⁹⁷ The net result of these two tendencies is that it will be more difficult for labor and management to reach agreement through negotiation rather than industrial warfare.⁹⁸ However, by incorporating the "Bill of Rights" for union members into the LMRDA, Congress determined that these costs are outweighed by the interests workers and society have in protecting freedom of communication among employees.⁹⁹ For although autocratic unions may satisfy the material demands of their members with a minimum of conflict, only democratic unions which tolerate dissent and criticism can foster the industrial self-determination upon which true industrial

Caputo, 316 F.2d 445 (2d Cir. 1963); *Morrissey v. National Maritime Union of America*, 397 F. Supp. 659 (S.D.N.Y. 1975); *Pearl v. Tartantola*, 361 F. Supp. 288 (S.D.N.Y. 1973).

⁹⁵ Although section 101(a)(2) appears to be an alternative basis on which to attack contractual waivers, it probably cannot be used to significantly expand the solicitation-distribution rights of employees beyond the boundaries currently established by Section 7. Since the "Bill of Rights" applies only to the union-member relationship, section 101(a)(2) cannot be invoked to nullify restrictions promulgated unilaterally by management against organizational activities falling outside the scope of Section 7. While section 101(a)(2) might prohibit unions from inducing or bargaining with employers to institute such unilateral rules, in practice this would be extremely difficult to prove.

⁹⁶ See *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 624 (6th Cir. 1965), denying enforcement 148 N.L.R.B. 1179 (1964); Comment, *NLRB v. Magnavox Co.: The Death Knell for Union Waivers of Employee Rights to Distribute Literature*, 60 VA. L. REV. 1073, 1077 (1974).

⁹⁷ See Comments by John Dunlop and accompanying discussion cited in Beaird, *supra* note 84, at 580, and Cox, *supra* note 84, at 829-30.

⁹⁸ See Cox, *supra* note 84, at 830.

⁹⁹ See *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967); *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir. 1963); Beaird, *supra* note 84, at 610.

peace can be established.¹⁰⁰ Like freedom of speech in the political arena, the freedom of employees to solicit support and distribute literature in the workplace engenders dissent and insurgency, but ultimately creates a more profound idealism and commitment to the nation's basic values and institutions.¹⁰¹

To fully protect the freedom of workers to communicate with each other in the workplace, the Board and the courts must not only continue to implement the holding of *Magnavox* that the solicitation-distribution rights of all employees are immune from union waiver. They should also explicitly endorse the view that *Magnavox* protects fundamental, personal rights belonging to individual employees. For although both rationales for the Supreme Court's decision encompass the distribution of union institutional literature, only the "individual rights" perspective affords protection to all organizational solicitation and literature distribution which is pertinent to Section 7.

Interpreting the *Magnavox* decision in this manner involves substantial intrusion upon the freedom of labor and management to contract concerning conditions of employment. But the Board and the courts have not hesitated to limit contractual freedom where fundamental principles of the nation's labor policy are at stake.¹⁰² If union waivers of employee solicitation-distribution rights merely impinged upon such peripheral organizational activities as the distribution of literature announcing union social events, there would be no compelling reason to interfere in the bargaining process between labor and management. But because employers and incumbent labor organizations often have mutual interests in suppressing challenges to the status quo, these waivers are typically utilized to restrain dissent and criticism dealing with areas of fundamental concern to employees. The waivers are directed not only against the organizational activities of employees supporting rival unions during representation controversies,¹⁰³ they are also invoked to stifle solicitation and literature distribution by members of dissident caucuses within incumbent labor organizations and even by militant individuals who are critical of present union representation or conditions of employment.¹⁰⁴ Regardless of the extent to which insurgent solicitation and literature distribution actually

¹⁰⁰ See *Navarro v. Gannon*, 385 F.2d 512, 518-19 (2d Cir. 1967); *Cox*, *supra* note 84, at 830.

¹⁰¹ See *Beaird*, *supra* note 84, at 610; *Cox*, *supra* note 84, at 854.

¹⁰² See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Local 154, IBEW v. Teamsters Local 959*, 507 F.2d 872 (9th Cir. 1974); *Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 337 F.2d 5 (2d Cir. 1964).

¹⁰³ E.g., *Armco Steel Corp.*, 148 N.L.R.B. 1179 (1964), *enforcement denied*, 344 F.2d 621 (6th Cir. 1965); *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964).

¹⁰⁴ E.g., *Ford Motor Co.*, 221 N.L.R.B. No. 99 (Nov. 13, 1975); *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. No. 46 (Nov. 4, 1975); *General Motors Corp.*, 211 N.L.R.B. No. 123 (June 25, 1974), *modified*, 512 F.2d 447 (6th Cir. 1975); *Massey-Ferguson, Inc.*, 211 N.L.R.B. No. 64 (June 12, 1974); *McDonnell Douglas Corp.*, 210 N.L.R.B. 280 (1974); *Ford Motor Co. (Sterling Plant)*, N.L.R.B. Ad. L. Decision No. JD-427-74 (June 21, 1974).

influence the attitudes of employees,¹⁰⁵ ensuring that workers have the freedom and opportunity to express their opinions and to hear opposing viewpoints on matters affecting the employment relation is so essential to the realization of union democracy and industrial self-government that the Board and the courts are certainly warranted in placing restraints upon the contractual freedom of unions in this area. Since the potential for abuse exists for such a broad spectrum of employee organizational activities, the only effective solution is to erect an absolute prohibition against union waiver of any employee solicitation-distribution rights.

V. CONCLUSION

The *Magnavox* decision has been liberally construed to give broad protection to the solicitation-distribution rights of employees. The NLRB has held that unions may not bargain away the rights of their opponents or supporters to conduct any organizational solicitation or literature distribution which is pertinent to matters encompassed by Section 7. However, the Board has noted that unions may still waive the rights of employees to distribute union institutional literature. Although it is not yet clear what position the courts will take, the Sixth Circuit has indicated that the protection afforded by *Magnavox* extends to organizational activities which are concerned only indirectly with the selection or rejection of the bargaining agent.

The Board and the courts should reject the distinction between institutional and organizational literature. Besides being difficult to define and apply, it conflicts with the rationales behind the *Magnavox* decision. By abandoning this anomalous distinction, the Board and the courts can make it clear that unions are precluded from waiving *any* employee solicitation-distribution rights. This position would be consistent with the view that the *Magnavox* decision protects fundamental rights of individual employees. Moreover, eliminating all union waivers of employee solicitation-distribution rights would comport with the principles embodied in section 101(a)(2) of the LMRDA. This section reflects a congressional judgment that the criticism and dissent engendered by the free exchange of ideas and opinions among workers must be tolerated if we are to achieve the ideals of union democracy and industrial self-government.

—Alan V. Reuther

¹⁰⁵ A recent study has indicated that employees do not attend closely to, nor are their attitudes greatly affected by, union or management campaign propaganda in representation elections. Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulations of Campaign Misrepresentations: An Empirical Evaluation, Part II*, 28 STAN. L. REV. 263 (1976). However, this study did not analyze the impact on employees of solicitation and literature distribution dealing with inter- or intra-union rivalries or with the immediate grievances of workers. In any event, the importance of this organizational activity cannot be measured by the number of workers whose opinions are altered by it. A shift in the attitudes of a few key workers can often have significant ramifications in a factory. Moreover, the symbolic importance of assuring at least an opportunity for dissent and criticism to be heard is crucial to preserving the appearance of fairness and democracy upon which the nation's system of labor relations is based.